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Supreme Court of the United States

OCTOBER TERM 1970

No. 507

CALIFORNIA DEPARTMENT OF
HUMAN RESOURCES DEVELOPMENT, et al.,
Appellants,

v.

JUDITH JAVA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief in support of the position of the Appellees is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred and twenty-one national and international unions having a total membership of approximately thirteen and one-half million working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

Unemployment compensation was designed to protect "industrial workers ordinarily employed," Report To The

President Of The Committee On Economic Security, 13 (1935). That, of course, is an accurate description of the great majority of the members of the Federation's affiliates. The fact that the instant case promises to have a substantial impact on the manner in which unemployment compensation is administered, is, therefore, more than sufficient cause for the AFL-CIO to be vitally concerned as to its outcome. But in this instance the practical importance of the question presented does not exhaust organized labor's interest in the proceeding. For § 1335 of the California Unemployment Insurance Code, the provision overturned by the court below (A. 133–140), is not based on a valid neutral principle—it is based on the principle that the entire costs of litigation delay incident to an appeal of an initial eligibility determination shall be borne by the unemployed. Thus, § 1335 discriminates against workers, as a class, and in favor of employers, as a class, without any rational basis, thereby distorting the basic protective purposes of the unemployment compensation law. This being so, we have sought this opportunity to present the Court with an expression of our views.

ARGUMENT

Litigation is a method for determining whether the *status quo ante* shall be changed. The impetus for a judicial or administrative proceeding is the plaintiff's demand that the defendant change his course of conduct by taking certain specific actions and the defendant's refusal so to do. As California properly emphasizes (Cal. Br. 6–7), such determinations take time, often in considerable amounts. Delay is thus an inherent cost of this method of dispute settlement. Who shall bear that cost is, therefore, of critical significance. The legal rules which govern that determination are those which set the terms upon which interim relief pending a final decision on the merits is available. Initially, the costs of delay are on the moving party. The preliminary injunction shifts those costs to the defendant. Moreover, in a system providing for appeals the costs of delay are on the appellant. A stay shifts those costs to the appellee. Because of its cost-shifting function, interim relief is often more important in practical terms than the final determina-

tion on the merits, cf., *Liner* v. *Jafco*, 375 U.S. 301, 307–308 (1964).

The instant case tests the validity of the procedure California has adopted to allocate the costs of delay incident to an employer appeal from an initial determination, made "after all parties have been heard" (A. 137), that a former employee is eligible for unemployment compensation. Section 1335 of the California Unemployment Compensation Code provides that once such an appeal is filed no benefits shall be paid pending the appellate decision; in other words § 1335 provides for an automatic stay of the initial determination. The court below held that this stay provision is in conflict with both § 503(a)(1) of the Social Security Act, 42 U.S.C 503(a)(1), which requires state unemployment compensation systems to be administered in a manner "reasonably calculated to insure full payment . . . when due," and the Due Process Clause (A. 138–140).

The procedural setting of § 1335 is succinctly stated in the lower court's decision (A. 133–137):

> "A claimant for unemployment insurance benefits must initially file Forms DE 1101, 1426 and 3893. These forms, taken together, apprise the eligibility interviewer of the basis of the claim, the name of the claimant's previous employer, the reason for his no longer working, his work experience, and so on. The question most frequently basic to disputed cases, i.e. the claimant's reasons for no longer working, is answered on DE 1101 and copies of this form are immediately sent to the previous employer for verification. The employer is then bound to submit, within ten days, 'any facts then known which may affect the claimant's eligibility for benefits.' Calif. Unempl. Ins. Cde. § 1327. If the employer raises an issue as to eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job . . . The interviewer has, according to the Local Office Manual used in California, the duty 'to seek from any source the facts required to make a prompt and proper determination of eligibility.' The actual decision may be suspended an additional ten days to get further information. If employer statements leave certain questions unresolved, the employer

'must be given an opportunity to provide additional information.' L.O.M. §§ 1400.3; 1400.5 . . . Interested persons must be allowed to 'confirm, contradict, refute, or explain any evidence [which is relevant].' L.O.M. § 1404.4.

"The eligibility interviewer must, then, consider the evidence presented by all sides and make a 'determination' or 'determination ruling' as to eligibility. 'The determination is the point at which any issue affecting claimant's eligibility is decided and fulfills the Department's legal obligation to insure that [b]enefits are paid promptly if claimant is eligible.' L.O.M. § 1400.1. Payments begin upon this decision . . . The appeal Form DE 1000, upon being filed [however] halts payments . . . generally after two payments have been made . . . [N]o hearing is held; no chance is given the claimant to rebut, even in writing, new information offered by the appellant . . . [T]he arrest of payments continues for a median period of seven weeks."

In contrast, there is no provision in the California law for interim relief in those cases in which the initial determination is adverse to a claimant. And the context would appear to preclude such a provision. For a mere rejected claim of entitlement does not seem a sufficient basis for the payment of funds which are reserved by law for a delimited group. The result of § 1335 is, therefore, that on an appeal from an initial determination, when a claimant is the appellant, appellants bear the costs of delay; yet when a claimant is an appellee, appellees bear these costs. Thus, the purported "balance" California has struck (Cal. Br. 9–10) is not based on a neutral principle for distributing the costs of litigation delay—*it is based on the principle that in each instance the entire burden of those costs shall be borne by the unemployed.* This is contrary to the requirements of § 503(a)(1) and due process—as we shall now demonstrate.

1. *§ 1335 Cal. Unemp. Ins. Code Is In Conflict With § 503(a)(1) Of The Social Security Act.*

(a) The fundamental federal standard, cf., *Steward Machine* v. *Davis*, 301 U.S. 548, 594 (1937), that unemployment compensation shall be administered in a manner

"reasonably calculated to insure full payment . . . when due" prohibits an automatic stay of a determination favoring eligibility, rendered by the state after "all parties have been heard [and the relevant] evidence has been collected" (A. 137). There is no statement of the precise ambit of the limitation imposed by § 503(a)(1). As California notes (Cal. Br. 7) the legislative history is "scant" in the extreme. In light of the basic policies of the Social Security Act, however, it is quite clear that Congress's intent was to insure that there would be a prompt determination, after a hearing open to all parties in the event of a contest, which would establish the claimant's "contractual right," cf., Report To The President Of The Committee On Economic Security, 13 (1935), to benefits. At that point, a firm and rational basis having been supplied, compensation is "due" and full payment is required as a matter of right. In terms of the reasoning suggested in the introduction, pp. 2-4 *supra*, § 503(a)(1) provides that the costs of litigation delay incident to a prompt initial hearing, open to all parties, shall be borne by claimants; but that after that hearing the costs of further delays shall fall on appellants, without regard to whether they are employers or claimants, and may not be imposed upon the unemployed in all cases.

(b) Unemployment compensation is designed to provide the displaced "industrial worker ordinarily employed," Committee On Economic Security Report at 13, with economic "security during the period following unemployment," in order to "maintain purchasing power at times when most needed" and to "encourage the regularization of employment," S. Rep. No. 628, 74th Cong., 1st Sess., 12, 16 (1935). Prompt provision of economic security is the keystone of the plan. Maintenance of consumer purchasing power to arrest a downward economic spiral, and encouragement of the pursuit of job opportunities to stabilize the labor market is dependent upon the payment of benefits at the earliest practicable moment after claims are made, and not after a substantial period of time has elapsed. For Congress's premise was that the benefits paid were not to provide a comfortable superfluity, but to "enable workers

who lose their jobs to tide themselves over . . . without having to resort to relief," H.R. Rep. No. 615, 74th Cong., 1st Sess. 7 (1935). As this Court noted in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967) the unemployed are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by compensation.

Despite the soothing assurances offered by California (Cal. Br. 14–15, 17, 22–24), and the *amici* supporting its position, e.g., Southern California Edison Co. *Amicus* Brief at 11-14, the available statistical evidence demonstrates that today, as in 1935, prompt payment of compensation is required to assure economic security to the average "industrial worker ordinarily employed," Committee On Economic Security Report at 13. The mean hourly wage of the rank and file worker as of November 1970 was $3.29 an hour, i.e. approximately $6,500 to $7,000 a year, U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 17, No. 6, p. 74, Table C-2 (Dec. 1970). Typically, that worker is the sole support of a family of four.[1] The latest government estimate places a "lower" weekly budget to feed, shelter, clothe and provide medical care for such a family at $90 a week, U.S. Dept. of Labor, Bureau of Labor Statistics, *Spring 1970 Cost Estimates For Urban Family Budgets*, Table 1 (Dec. 21, 1970). But the median liquid assets of that family, available to meet an emergency which cuts off the flow of income, is $260, Katona, et al., Survey of Consumer Finances p. 100, Table 6-3 (1970). Thus, the typical industrial worker has funds to tide him over for only three weeks of unemployment.

The policy favoring prompt payment does not stand alone. Unemployment compensation does not provide "social insurance," see, Note, *Charity Versus Social Insurance In Unemployment Compensation Laws*, 73 Yale

[1] There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. Statistical Abstract of the United States 1970, p. 35, Table 40. In over 55% of families only one spouse is an income earner, U.S. Dept. of Commerce, Bureau of The Census, *Current Population Reports*, Series P-60, No. 75, p. 55, Table 24 (Dec. 14, 1970).

L.J. 357 (1963) for every citizen nor does it cover all risks of those whom it does protect. To be eligible the claimant must have sufficient earnings in the base period to demonstrate an attachment to the labor market, see, § 1275 Cal. Unemp. Ins. Code, and his unemployment must be involuntary, see, *id.* at § 1240. Moreover, California, in common with most states, has an experience rating system which provides that an employer's tax payments to the Fund shall vary with the number of his former employees who qualify for benefits, see, *id.* at §§ 977, 978. These two features of the unemployment compensation system require procedures for determining eligibility at which the claimant's former employer may be heard. This is necessary to carry out the intent of the law, to insure that the fund is not depleted by improper payments, and secondarily to safeguard the limited interest of former employers.

Section 503(a)(1) of the Social Security Act resolves these competing considerations by mandating prompt determinations of eligibility, after all parties are heard, which establish the claimant's contractual right to benefits, thereby making full payment to him "due." The California experience makes it plain that this resolution of the relevant interests provides the optimum solution to the problem presented.

As the court below recognized, the California law provides for an initial determination, within 21 days of the filing of a claim (A. 128-131), after "all parties have been heard [and the relevant] evidence has been collected" (A. 136–137). This procedure is effective in insuring that benefits are limited to eligible claimants. In 1969 there were 395,740 initial determinations in favor of claimants. During the same period 113,395 initial claims were disallowed because of insufficient base period wages, and 139,274 claims were disallowed because the claimants had left their last employment under disqualifying conditions. Employers appealed 8,315 of the favorable determinations, and 5,325 of these appeals, 64% of the total, resulted in *affirmance* of the finding of eligibility. Appellant's Jurisdictional Statement, App. C. p. 14. Thus, the overwhelm-

ing preponderance of ineligible claimants, 98.2% of the total, are screened out at the initial determination stage. The system is not dependent on further hearings to limit the payment of benefits to those who are eligible.

The record also demonstrates that stays pending employer appeals are not necessary to safeguard against depletion of the Fund. In 1969 abolition of the stay procedure would have resulted in payments of approximately $950,000 to claimants later held ineligible, Juris. State., App. C, at 14–15.[2] The loss to the Fund would have been on the order of $350,000, however, for California states that in the period 1965 to 1969 it recovered 64% of "benefits paid to claimants not eligible," *ibid.* In 1969 California collected $587,122,000 in unemployment taxes and interest. And the Fund's reserves stood at $1,304,868,000, which represented a one year increase of $170,354,000. U.S. Dept. of Labor, Bureau of Manpower Administration, *Unemployment Insurance Statistics,* Table 6 (March 1970). Abolition of the stay requirement would, therefore, result in a loss equal to .06% of income, .03% of reserves, and .2% of one year's increase in the reserve. Thus the Fund's solvency is assured. And the spectre of a tax increase if the decision below is affirmed is wholly illusory.

Finally, it is plain that § 1335's stay provision is not necessary to insure former employers an adequate opportunity to protect their experience ratings. California law allows such employers a full opportunity to be heard prior to the initial determination (A. 135–137). Moreover § 1335(b) provides:

> "If [a] determination [in favor of a claimant] is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

Thus elimination of the stay procedure does not even touch, much less harm, the limited financial interest of former employers. And, of course, § 1335(b) by itself insures that such employers will continue to have a sufficient

[2] There were 2,990 successful employer appeals, the average benefit paid was $52 a week, and the median time for an appeal was 6 weeks.

economic interest to motivate them to appeal when there is a substantial allegation of error at the initial stage.

The foregoing demonstrates that a stay pending an employer appeal from a determination reached after full hearing does not significantly further sound administration of unemployment compensation. In contrast, such stays undermine, to a marked degree, the basic objectives of the law. The median time necessary to hear and decide an employer appeal in California is 6 to 7 weeks (A. 49; Juris. State. App. C. p. 15) and the median period of unemployment is 9 weeks (A. 139). Assuming a random distribution, approximately half of those found eligible on appeal will receive their benefits after they have regained employment. That result is directly contrary to Congress's desire to provide compensation "during the period following unemployment when the unemployed are seeking another job or waiting for a return to their old positions," S. Rep. No. 628 at 12. Moreover, the typical industrial worker has sufficient resources to make ends meet during the normal three-week period provided by California for an initial determination (A. 128-131). At that point, his resources are apt to be exhausted, see, p. 6 *supra*. Yet § 1335 requires him to wait a median period of one and a half additional months to secure the moneys which were intended to "tide [him] over [unemployment] . . . without having to resort to relief," H.R. Rep. No. 615 at 7. Obviously, this thwarts the inherent "protection afforded by social insurance [which] comes to the worker as a matter of right," 79 Cong. Rec. 5468 (1935; Remarks of Rep. Doughton, Chairman of the Committee on Ways and Means).

Indeed, it is difficult to conceive of a provision more inconsistent than § 1335 with the social insurance philosophy which informs unemployment compensation. The essence of social insurance is that payments are due under "clearly defined conditions" stated in "such a way that the worker can determine his benefit beforehand," Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 2 (1945). Its antithesis is a system which subjects a worker's entitlement to his former employer's arbitrary

veto power. And § 1335 does give employers precisely that veto power. It allows for no distinctions. An appeal automatically stays the payment of benefits, even if frivolous and filed with the specific intent to harass.

The foregoing makes it plain that placing the entire costs of delay incident to appeals of initial determinations on claimants would be unjustified in any event. And that practice is manifestly intolerable in a system in which 64% of employer appeals are decided in favor of claimants.

(c) The basic argument presented to justify § 1335 (Cal. Br. 7–8) is that it is in conformity with the model statutes drafted by Edwin Witte, Executive Director of the Committee on Economic Security, see, Witte, The Development Of The Social Security Act, 125-126 n. 78 (1963); Hearing On S. 1130, 74th Cong., 1st Sess., 602, 623 (1935), and the District of Columbia Unemployment Compensation Law, § 46–311 D. C. Code. The model statutes and the D. C. law do provide for stays pending an employer "appeal" from an initial determination. However, it is quite clear that it was the contemplation of those bills that the initial determination would be based solely on the claimant's information, and that the "appeal" would be the employer's first opportunity to be heard. For that is the manner in which the D. C. law is administered, *D. C. Compensation Board* v. *Hahn*, 399 F.2d 987, 989–990 (C.A. D.C., 1968). Thus, these statutes are consistent with the position developed herein, rather than with § 1335. The question of whether there shall be a stay pending a full hearing is entirely distinct from the question of whether stays shall be permitted after such a hearing. For a full hearing alters the calculus of the relevant interests. Thus our contention is simply that full payment is "due" upon a prompt determination in favor of the claimant rendered after all parties have been heard. Section 503(a)(1) makes no distinction between procedures, such as California's in which the hearing occurs at the earliest stage, and procedures, such as D. C.'s, in which the initial determination is made solely on the claimant's information and in which the first hearing occurs on "appeal." The limitations it imposes are, as the model

statutes expressly state that "disputed [claims] shall be promptly decided," Hearings on S. 1130 at 623; and that after the initial hearing the costs of further litigation delay shall fall on appellants and may not be shifted to claimants.

The subsidiary arguments advanced by California are all contrary to the facts. First, the theme of California's brief is that it follows from the fact that there is no "means" test for unemployment compensation that claimants can easily weather the "delay . . . of modest duration" imposed by § 1335 (Cal. Br. 22–23, 14, 16). The logic of this position is faulty. The decision not to impose a "means" test does not lead to the conclusion that if there were such a test the majority of claimants would be denied benefits. The means test was omitted because of ethical considerations, not because it was believed that the intended beneficiaries were well-to-do. As Representative Doughton stated, the form of the bill was dictated by a belief that workers who had contributed to the creation of the wealth paid into the fund should not have their benefits marked with "the stigma of charity with its devastating effect on the morale of the population" 79 Cong. Rec. 5468. But Congress recognized that the typically displaced "industrial worker ordinarily employed" could not "tide himself over" a period of unemployment without compensation. That is the reason the law was passed, pp. 5-6 *supra*. And today as in 1935 the evidence indicates that the typical worker can not wait 6 to 7 weeks for his benefits without suffering substantial harm.

Second, it is contended (Cal. Br. 9–10) that employer appeals "cast a sufficient cloud on the initial determination to warrant withholding benefits." An employer's self-selection as an appellant is not a rational basis for concluding that an initial determination favoring eligibility was erroneous. That is clear from the fact that 64% of such decisions are affirmed, Juris. State. App. C at 15.

Third, California states (Cal. Br. 16) that payments to those later found ineligible are "essentially unrecoverable." The affidavit attached to its Jurisdictional Statement at

App. C, p. 15, however, states that from 1965 through 1969 64% of payments to ineligible claimants were recovered. And California Insurance Appeals Board, *In The Matter Of Everard A. Goding* (1969) (A. 90–92) demonstrates that the doubts expressed (Cal. Br. 16 n. 10) as to the availability of recoupment under § 1375 Cal. Unemp. Ins. Code are baseless.

Fourth, starting from the twin premises that payments to ineligible claimants are unrecoverable, and that the decision below requires that all "disqualified claimants should be paid benefits until given a referee hearing," Juris. State. App. C at 15, it is asserted (Cal. Br. 16) that elimination of the stay provision would require replenishment of the Fund by new levies upon employers. As just noted the first of these premises is unwarranted. It is equally clear that the second is also unsound. This case has nothing to do with the rights of disqualified claimants, see, p. 4 *supra*. It deals solely with the treatment, pending an employer appeal, of claimants who have been found *eligible* by the state, on the basis of a full hearing. Moreover, once this matter is put in proper context the data developed at p. 8 *supra*, belies the necessity of a tax increase. It demonstrates that the decision below does not threaten the soundness of the Fund to the slightest degree.

Fifth, it is argued (Cal. Br. 16–17, ns. 11, 12) that elimination of § 1335 would result in "the employer's property being taken away before he had had a meaningful opportunity to be heard." If this reference is to the interest of former employers in their experience ratings it is contrary to the record. The court below held that California law provides for "evidence [to be] presented by all sides" and for "all parties [to] have been heard" prior to an initial determination (A. 136–137). Moreover, § 1335(b) provides that an employer's reserve account shall not be charged for any payments to an ineligible claimant. If the reference is to the interest of all employers in procedures which minimize the basic tax rate, there are two short but complete answers. As a matter of fact elimination of the stay provision will not affect that interest, pp. — *supra*. As

a matter of law that interest is "too remote contingent and speculative" to warrant protection, *Gange Lumber Co. v. Rowley*, 326 U.S. 295, 305 (1945).

Finally, it is absolutely plain that the decision below would not "encourage frivolous appeal although the villain would be the employee, not the employer" (Cal. Br. 17 n. 13). The rule of law contended for here requires all appellants, without regard to whether they are employers or claimants, to bear the costs of delay. Claimants only appeal initial determinations finding them ineligible. In such cases, as we have noted, p. 4 *supra*, there is no requirement that benefits be paid pending the appellate decision. Thus, while § 1335 does encourage frivolous appeals by employers, the decision below discourages such appeals by both employers and claimants.

2. *§ 1335 Cal. Unemp. Ins. Code Is In Conflict With The Due Process Clause.*

The crucial process of granting or withholding interim relief is, of course, subject to the requirements of the Due Process Clause. That, indeed, is the premise of this Court's recent decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). *Sniadich* and *Goldberg* are seminal cases opening numerous legal perspectives. Their central concern, however, is with the limits the Constitution places on the choice of procedures utilized to shift the costs of litigation delay from one party to another.

In *Sniadach* the question was "whether the interim freezing of wages without a chance to be heard violates procedural due process," 395 U.S. at 340. This question was answered by the finding of a violation. The Court noted that prejudgment garnishment "may impose tremendous hardships on wage earners with families to support"; that the procedure "made possible . . . grave injustices"; that it created "enormous . . . leverage of the creditor on the wage earner"; and that the amount left the garnishee is "generally insufficient to support the debtor for any one week," 395 U.S. at 340–341. On this basis the conclusion was reached that:

> "The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 341–342.

In *Goldberg* the problem presented was whether welfare payments to a recipient who had been ruled eligible could be cut off prior to a hearing at which he could "appear personally, offer oral evidence, confront and cross-examine the witnesses against him. . . ." Thus the constitutional issue to be decided was "whether the Due Process Clause requires that a recipient be afforded an evidentiary hearing *before* the termination of benefits." 397 U.S. at 260 (this Court's emphasis). The holding of *Goldberg* is that "summary action pending a later hearing" is prohibited and that a pre-termination hearing is required:

> "It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967). Thus the crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.
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>
> "Moreover, important governmental interests are prompted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same

> opportunities that are available to others to participate meaningfully in the life of the community. . . . The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end. Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. . . .
>
> "We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. . . . Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens." 397 U.S. at 263-266 (this Court's emphasis).

In analytical terms, then, both *Sniadach* and *Goldberg* deal with procedures which automatically, without providing for effective notice and hearing, shift the costs of normal litigation delay from the party who would ordinarily bear them to the other side. And the underlying theory of those cases is that such procedures do not meet the requirements of due process where they shift these costs to a party who is thereby "condemned to suffer grievious loss," *Goldberg*, 397 U.S. at 263, absent a clear showing of an "overriding governmental interest," *id.* at 266. For in that situation, at least, "the stakes are simply too high," *ibid*, to allow a departure from "the fundamental requisite of due process of law [which] is the opportunity to be heard . . . at a meaningful time and in a meaningful manner," 397 at 267.

An initial determination of eligibility, made after "all parties have been heard" (A. 137), establishes that unemployment compensation payments are "due", *ibid.*, see, pp. 4-10 *supra*. California's "actual practice . . . is to begin payments" at that point, *ibid.* These payments are a matter of "statutory entitlement" which it is "realistic . . . to regard as more like 'property' than a 'gratuity' ", *Goldberg*, 397 U.S. at 262 & n.8. They are a "contractual right", Committee On Economic Security Report at 13, to a portion of a fund comprised of wealth which the claimant's labor helped to create. Indeed the unemployed worker's share of the fund varies in proportion to the value of the services which he provided, §§ 1275, 1280-1281 Cal. Unemp. Ins. Code. Section 1335 operates to deprive a claimant of the enjoyment of this right. The stay pending an employer appeal which it authorizes, automatically, without provision for notice or hearing, overrides an unreversed determination by the state as to his entitlement. Thus § 1335, like a prejudgment garnishment or a summary termination of welfare benefits, is a form of interim relief which shifts the costs of litigation delay from the party who would ordinarily bear them, here the employer-appellant, to the other side, here the claimant-appellee.

In the instant case, as in *Sniadach* and *Goldberg*, the result of this interim relief is to condemn the party who must bear those costs "to suffer grievous loss," 397 U.S. at 263. The typical displaced "industrial worker ordinarily employed," Committee On Industrial Security Report at 15, who is denied unemployment compensation pursuant to § 1335 occupies a position somewhat worse than the garnisheed employee, and somewhat better than the welfare recipient whose benefits are summarily terminated. The garnisheed employee, in addition to his liquid assets, has a continuing income in the form of a "subsistence allowance" of $25 to $50 to a week, *Sniadach*, 395 U.S. at 338 n.1. The typical displaced industrial worker has median liquid assets of $260 but no continuing income, p. 6 *supra*. And the welfare recipient "lacks [all] independent resources", *Goldberg*, 397 U.S. at 264. But in terms of the applicable legal standard these are distinctions without a difference.

For here as in *Sniadach* the granting of interim relief "may impose tremendous hardship on wage earners with families to support," it "may as a practical matter drive a wage earning family to the wall" because the money available will "generally be insufficient to support [the unemployed worker] for any one week," 395 U.S. at 340, 341-342. Thus in the instant case no less than in *Goldberg* "termination of [benefits] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits," 397 U.S. at 264 (this Court's emphasis), see, pp. 5-6, 9 *supra*.

While the position of the garnisheed employee, the compensation claimant, and the welfare beneficiary are comparable, the governmental interests supporting interim relief here are even more attenuated than those advanced in *Sniadach* and *Goldberg*. The loss of prejudgment garnishments undoubtedly harms honest blameless creditors, as a class, in a very real way. And there can be no doubt that the loss of the power to summarily terminate welfare benefits creates a "drain on fiscal and administrative resources" *Goldberg*, 397 U.S. at 266, of some dimension. In contrast the deleterious effects of abolishing stays pending employer appeals are miniscule. The ability of former employers to protect their experience ratings is untouched. The interest of the state, and of employers generally in a sound fund financed at minimal tax rates is unimpaired. And here, in contrast to *Goldberg*, 397 U.S. at 266, the interest in assuring that only eligible claimants receive benefits is safeguarded by an effective power to recover erroneous payments as well as by the fact that former employers continue to have an economic incentive to appeal questionable determinations. Finally, affirmance of the decision below may actually serve to reduce administrative expenses by reducing the incentive for frivolous appeals. See pp. 7-9 *supra*.

The basic argument put forward by California (Cal. Br. 18-24), which has already been refuted in detail, is that the unemployed are insufficiently needy to fall within the *rationale of Goldberg*. A buttressing point for that contention, not yet dealt with, is that, if necessary, compensation

claimants can secure welfare while awaiting determination of an employer appeal. In the context of the statute California is obligated to administer that point is impermissible. "The most fundamental purpose of . . . unemployment compensation . . . 'is to *prevent* the burden of injured employees being charges upon society' " (A. 138, emphasis in the original). Congress regarded referral of the displaced "industrial worker ordinarily employed" to welfare as a "grievous loss" in and of itself, because of the resulting "devastating effect on . . . morale . . . and . . . self respect," 79 Cong. Rec. 5468. Moreover, California's premise is incorrect:

> "Welfare is not available to single employable males between ages 20 and 45 in most counties. Moreover, in order to qualify for welfare assistance, a claimant with a family must come wthin the requirements of one of the categorical aid programs, of which there are four: Old Age Assistance; Aid to the Disabled; Aid to the Blind; and Aid to Families with Dependent Children. *Cal. W & I Code* Section 11200; 11200; 12500; 13500. Since a claimant would have to be of retirement age, disabled, or blind to qualify for the first three, they can be disregarded. In order to qualify for the fourth, the claimant's family must have less than $600 in personal property. *Cal. W & I Code* Section 11255. The claimant with a family therefore, must divest himself of nearly all of his assets before he can be eligible for the receipt of welfare benefits." (A. 78-79).

Finally it is asserted (Cal. Br. 18-19) that "in *Goldberg* the question of basic eligibility was closed and the focus was on subsequent termination," that "the question of basic eligibility is still open" here, and that this distinguishes the instant case since it would be improper to hold "that a claimant is entitled to payment *before* his eligibility has been established" (emphasis in the original). This is a calculated misconstruction of the theory of this case. Nothing sought herein would require the states to make payments to a claimant who has not been found eligible. The sole result of the decision below is to insure that where a ruling on the merits, made after "all parties have been heard," is in favor of eligibility the claimant may not be deprived of the en-

titlement thus established by a process of automatic interim relief without provision for notice and hearing. And contrary to the implication of California's argument, *Sniadach* demonstrates that this basic measure of due process protection is applicable at the initial stages of litigation and is not limited to situations in which the appellate process has been exhausted.

The sum of the matter is that the standards developed in *Sniadach* and *Goldberg* demonstrate that a finding that § 1335 is unconstitutional follows *a fortiori* from those decisions.

CONCLUSION

For the above stated reasons the judgment below should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washingon, D. C. 20006

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